



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FEB 06 2009

Kindes Durkee, in her official capacity as treasurer of
Californians for Change f/k/a Californians for Obama
c/o Laurence S. Zakson, Esq.
Reich, Adell & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010

RE: MUR 5951 (Californians for Change)

Dear Mr. Zakson:

On November 8, 2007, the Federal Election Commission notified Californians for Change f/k/a Californians for Obama ("Committee") and your client, Kindes Durkee, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on December 3, 2008, found that there is reason to believe the Committee and your client, as treasurer, violated 2 U.S.C. §§ 432(e)(4), 441d(a), and 441h(b), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

| In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General

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Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extension of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,


Steven T. Walther
Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 5951

Respondents: Californians for Change f/k/a Californians for Obama and Kinde Durkee,
in her official capacity as treasurer

I. INTRODUCTION

This matter involves allegations that Californians for Change f/k/a Californians for Obama ("CFO" or "Committee"), an unauthorized committee, misrepresented itself as being affiliated with Presidential candidate Barack Obama and operated in a fraudulent manner. Specifically, the complaint by Ercell Hoffman alleges that she paid \$2,423.76 to attend the CFO-sponsored "Women of Power Cruise" and that the cruise was cancelled but her money has not yet been refunded. A press article prior to the complaint quoted the Complainant: "It's called Californians for Obama. ... I thought they were representatives of Obama." See Carla Marinucci, *Fundraiser Cashes In – Obama Gets Zero*, San Francisco Chronicle, July 25, 2007. The complaint alleges that CFO's actions constitute fraud.

Committee treasurer Kinde Durkee responded through counsel that neither she nor her firm, Durkee and Associates, LLC, had any responsibility or role in the Committee's fundraising solicitation or any discretionary authority with respect to expenditures.

As set forth below, CFO's unauthorized use of a candidate's name, Californians for Obama, and CFO's lack of a proper disclaimer on its website as to whether or not its activities were authorized by a candidate, appear to constitute violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). See 2 U.S.C. §§ 432(e)(4) and 441d(a). Although the Committee website includes a statement that CFO is an "Independent committee," the

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1 aforementioned violations, taken together with other available information, suggest a possible
2 violation of the Act's prohibition on fraudulent solicitation. See 2 U.S.C. § 441h(b).
3 Accordingly, the Commission finds there is reason to believe that Californians for Change f/k/a
4 Californians for Obama and Kinde Durkee, in her official capacity as treasurer, have violated the
5 Act in this matter.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Factual Summary**

8 Although the complaint and response provide little information regarding CFO's activity,
9 publicly available information such as CFO's website, the Committee's disclosure reports, and
10 press reports provide a partial picture. CFO filed a Statement of Organization with the
11 Commission on December 12, 2006, identifying itself as an unauthorized single candidate
12 committee and identifying that candidate as Barack Obama.¹ CFO also launched a website, with
13 a banner consisting of a picture of Sen. Obama and the words "Californians for Obama" in front
14 of an American flag motif. See <http://www.californiansforobama.com>.²

¹ The Commission's regulations define "single candidate committee" as a political committee other than a principal campaign committee which makes or receives contributions or makes expenditures on behalf of only one candidate. 11 C.F.R. § 100.5(e)(2).

² The initial version of CFO's website described the Committee's intention to draft Sen. Obama as a presidential candidate. See <http://web.archive.org/web/20070209090316/http://www.californiansforobama.com>. The site was amended shortly thereafter to state that Sen. Obama had announced his intention to seek the 2008 Democratic nomination for President. See <http://web.archive.org/web/20070217101339/http://www.californiansforobama.com>. The website lists an extensive series of CFO activities: meetings in various parts of California, a "Women of Power Cruise," a fashion show, a telethon, and the formation of 25 occupation/profession-based committees with the goal of "formulat[ing] policies." It is unclear how many of CFO's advertised activities and events actually took place. For example, the January 30, 2007 meeting in Bakersfield, California is confirmed by a press article. See Jason Kotowski, *Meeting held for Obama supporters*, [Bakersfield.com](http://www.bakersfield.com), January 30, 2007, available at <http://www.bakersfield.com/102/story/97249.html>. By contrast, the "Women of Power Cruise," scheduled for September 21-24, 2007, never took place.

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1 CFO's website contains a "Contribute" page which states:

2 Contributions are not tax-deductible. Charges will appear as *Contributions* on your
3 credit card statement. "Californians for Obama" is a Independent [sic] committee to
4 elect Obama and is registered with the Federal Election Commission -
5 Emmett Cash, III
6

7 This is the only disclaimer on CFO's website.³

8 Two other areas of CFO's website that solicit contributions are pages devoted to
9 "Campaign Memorabilia" and the "Women of Power Cruise." The "Campaign Memorabilia"
10 pages sell "Obama '08" and CFO bumper stickers, t-shirts and so forth. The "Women of Power
11 Cruise" is described as a three-day cruise providing an opportunity to network "[w]ith over 2,000
12 energized women." Nineteen "[i]nvited speakers and panelists" are listed, including Eartha Kitt,
13 U.S. Representative Diane Watson and Maya Angelou. The cruise reservation form offers
14 several levels of accommodations, from "Mate's 4" for \$400 to "Captain's Suite" for \$2,300, and
15 instructs participants to "add Taxes and Fees of \$123.76 to the total amount due (custom fees,
16 government fees, immigration tax, gratuities)."⁴

³ Some earlier versions of CFO's website appear to contain the sentence about CFO being "Independent" at the end of the site's main page. See, e.g., <http://web.archive.org/web/20070217101339/http://www.californiansforobama.com>.

⁴ Neither the "Campaign Memorabilia" nor the "Women of Power Cruise" pages specify that payments to CFO are political contributions, although CFO disclosed as a contribution the receipt of Complainant's \$2,423.76 payment for the cruise. See 11 C.F.R. § 100.53 (the entire amount paid to attend a fundraiser or other political event and the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution). In addition, no disclaimer is included on these pages of CFO's website. Instead, on the first "Women of Power Cruise" page, CFO lists its "Federal Election Commission ID# C0043892." CFO's actual FEC committee ID is C00430892, which appears elsewhere on CFO's website.

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CFO also solicited contributions through its "Internet Telethon."⁵ The telethon, which featured various entertainers, began with screen text "Emmett Cash III and New World Motion Pictures Studios Presents..." and then a picture of Sen. Obama with his name, followed by an overlay of text, "Californians for Obama ... the first Internet 'Telethon.'"⁶ When the first speaker welcomes viewers to "the presidential election campaign telethon for Barack Obama," a banner contains a similar picture of Sen. Obama along with the phrase "Obama 08." Cash introduces himself as "State Chairman for Californians for Obama" and states that he has "accepted this position very gladly" in light of Sen. Obama's positive qualities. Speakers including Cash repeatedly ask viewers to go to CFO's website to contribute up to \$2,300:

- "[S]o you will be able to participate and give generously because this is such a momentous event 08 Obama 08" [sic];
- "You can play a major role in making sure Barack Obama becomes President in 2008. Just by your minor contribution one dollar, five, ten, one thousand it matters not what you send Go to www.californiansforobama.com right now;"
- "[S]end what you can; the success of the campaign is in your hands;"
- "Obama is a great candidate and he can't make it unless we get your support;"
- Viewers' "help and support" is asked for, including "walking our perimeter, passing out literature, helping to address envelopes;"
- "[I]f you can't make a contribution, you can go to the campaign office and volunteer"; and

⁵ According to CFO's website, the telethon was to take place on March 25, 2007. According to the text at the start of a video of the telethon, the telethon was "broadcast" on March 29 and April 1, 2007. The video may be viewed at <http://web.archive.org/web/20070401093323/http://www.californiansforobama.com>.

⁶ Emmett Cash III is president of New World Motion Picture Studios, a California corporation whose status is "suspended" according to the California Secretary of State website.

- 1 ▪ "The primary is in February next year; we are going to need millions of dollars to
2 make a difference."

3
4 A window into CFO's activities is also possible through its disclosure reports. In

5 July 2007, CFO filed a Mid Year Report disclosing receipts of \$9,683.37⁷ and disbursements of
6 \$8,147.30. None of CFO's spending is in the form of contributions or independent expenditures
7 in support of Sen. Obama. By far the largest recipient of CFO payments was Cash, who received
8 a total of \$3,155.04, mostly for "gas" and "salary." CFO also disclosed payments totaling
9 \$887.23 to Durkee & Associates, the firm of Committee treasurer Kinde Durkee, for
10 "Accounting," and payments apparently related to fundraising, such as \$336.75 to Precision of
11 Iowa, a telemarketing firm, for "fundraising fee," and \$511.00 to the U.S. Postal Service for
12 postage and stamps. These latter two disbursements suggest that CFO conducted telemarketing
13 and direct mail; Cash confirmed the direct mail activity in press accounts. *See infra.* The
14 Committee later disclosed a \$480.00 independent expenditure in support of Barack Obama on
15 July 13, 2007, its sole disbursement in support of the candidate.

16 Shortly after the Committee filed its 2007 Mid Year Report, press accounts reported:

- 17 ▪ Sen. Obama's presidential campaign asked CFO to close operations;
18
19 ▪ Several celebrities advertised as attending CFO's "Women of Power Cruise" had never been
20 contacted in connection with attending the event;
21
22 ▪ Cash asserted that he never claimed his efforts were official or beneficial to Sen. Obama's
23 campaign, and that his web site and literature specify that CFO is an independent committee;
24 and
25
26 ▪ Cash acknowledged that none of CFO's money went directly to Sen. Obama's official
27 campaign, but asserted that he contributed to Sen. Obama's presidential campaign by urging

⁷ This entire amount was in the form of contributions except for a \$100.00 loan from the Committee treasurer, Kinde Durkee.

1 contributors to write checks, by sending out mail advertisements, and helping to push for
2 voter registration.

3
4 ■ Cash is quoted that his only aim was "to raise money to cover the expenses of what [we're]
5 doing ... it does take a little bit to run up and down the state and to carry people with you."
6 CFO, according to Cash, had only one goal: "We want a part of this great man, too."

7
8 See Carla Marinucci, *Fundraiser Cashes In - Obama Gets Zero*, San Francisco Chronicle,
9 July 25, 2007.

10 Shortly after this press attention, and the request from the Obama campaign, the
11 Committee changed its name to Californians for Change and largely suspended operations.⁸

12 On August 10, 2007, Cash wrote to the Complainant regarding the cancellation of the
13 "Women of Power Cruise," stating that the Complainant's \$2,423.76 paid toward the event "will
14 be returned within a short period of time." Several weeks later, by letter dated September 25,
15 2007, the Complainant asked Cash for a refund of her money. On the Committee's 2007 Year
16 End Report, it disclosed a debt of \$2,423.76 to Complainant for the refund of her contribution
17 along with refund debts to three other contributors in the amount of \$100 each.⁹

18
19
20

⁸ On August 9, 2007, CFO amended its Statement of Organization to change its name to Californians for Change and identify itself as a committee supporting/opposing more than one Federal candidate. The Committee disclosed total 2007 receipts of \$10,583.76 and disbursements of \$10,517.44. The Committee's \$480.00 independent expenditure in support of Barack Obama, its only spending on independent expenditures or contributions, represented only 4.6% of the Committee's overall spending.

⁹ The Committee also disclosed a debt of \$6,430.97 to Dunfee & Associates for "Accounting Services." The Committee's receipts consisted of a single \$680 contribution and a \$400 loan from Cash. The Committee's disbursements of \$2,370.14 included \$481.29 to Emmett Cash III for gas and food, \$345.44 to various vendors for gas and food, \$525.30 for telephone, \$155.37 for website design, and five contribution refunds of \$100.00 each.

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B. Legal Analysis

1. Use of a candidate's name

The Act prohibits the use of a candidate's name in the name of an unauthorized committee. 2 U.S.C. § 432(e)(4). CFO, an unauthorized committee, used the name of a candidate, Barack Obama, in its name in conducting most of the activity at issue in this matter,¹⁰ and none of the exceptions set forth in 11 C.F.R. § 102.14(b) apply.¹¹ Accordingly, there is reason to believe that Californians for Change ~~file~~/a Californians for Obama and Kinde Durkee, in her official capacity as treasurer, violated 2 U.S.C. § 432(e)(4).

2. Lack of proper disclaimer

The Act requires political committee communications to contain disclaimers. 2 U.S.C. § 441d(a). The disclaimer requirements apply to all Internet websites of political committees available to the general public. See 11 C.F.R. § 110.11(a)(1). Accordingly, committee websites, if not authorized by a candidate, shall clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3).

¹⁰ For example, according to its disclosure reports, the Committee received \$9,683.76 of its overall \$10,583.76 receipts (91%), and made \$9,681.72 of its overall \$10,517.44 disbursements (92%) under the name CFO prior to changing its name to Californians for Change.

¹¹ These exceptions apply to 1) delegate committees, 2) draft committees if the committee's name clearly indicates that it is a draft committee, and 3) special projects and other communications of unauthorized committees if the title clearly and unambiguously shows opposition to the named candidate. 11 C.F.R. § 102.14(b)(1) - (3). Although CFO's website initially described the Committee as a draft committee, CFO failed to specify in its name that it was a draft committee. See *id.* at 102.14(b)(2). In any event, according to CFO's own website, on February 10, 2007, Sen. Obama declared his intention to seek the Democratic nomination for the 2008 presidential election, so any possible "draft committee" status on the part of CFO was mooted early in CFO's existence.

1 The CFO website contains no disclaimer except on the "Contribute" page, where it states
2 in relevant part "'Californians for Obama' is a Independent [sic] committee to elect Obama and
3 is registered with the Federal Election Commission." This disclaimer fails to state whether the
4 website is authorized by a candidate and fails to state who paid for the website. See 2 U.S.C.
5 § 441d(a)(3). Accordingly, there is reason to believe that Californians for Change f/k/a
6 Californians for Obama and Kinde Durkee, in her official capacity as treasurer, violated 2 U.S.C.
7 § 441d(a).

8 **3. Fraudulent solicitation**

9 The unauthorized use of a candidate's name and the lack of proper disclaimers are also
10 relevant in the consideration of whether the Committee and Cash fraudulently misrepresented
11 themselves as acting on behalf of Sen. Obama for the purpose of soliciting contributions. See
12 2 U.S.C. § 441h(b). As set forth below, the Commission finds that the available information
13 warrants a finding of reason to believe in this matter.

14 Section 441h(b) provides that no person shall (1) fraudulently misrepresent the person as
15 speaking, writing, or otherwise acting for or on behalf of any candidate or political party or
16 employee or agent thereof for the purpose of soliciting contributions or donations; or (2) willfully
17 and knowingly participate in or conspire to participate in any plan, scheme or design to violate
18 paragraph (1). See also 11 C.F.R. § 110.16.¹²

¹² Section 441h(b) was added to the Act by the Bipartisan Campaign Reform Act of 2002 ("BCRA") and was intended to address the Commission's inability under the pre-BCRA statute to pursue enforcement actions against persons and organizations not associated with a candidate who engage in fraudulent solicitation of funds. See 2 U.S.C. § 441h (2000); *Explanation and Justification of 11 C.F.R. § 110.16*, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002). In enacting section 441h(b), Congress cited the Commission's inability under then-section 441h to take action against organizations fraudulently soliciting funds by posing as political committees or candidates:

1 To violate section 441h, the Act requires that the violator had the intent to deceive, but
2 does not require that the violator sustain all elements of common law fraud. "Unlike common
3 law fraudulent misrepresentation, section 441h gives rise to no tort action..." and therefore, proof
4 of justifiable reliance and damages is not necessary. *See Explanation and Justification of*
5 *11 C.F.R. § 110.16*, 67 Fed. Reg. 76,962, 76,969 (Dec. 15, 2002); *Neder v. United States*, 527
6 U.S. 1, 24-25 (1999) (citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)).
7 Further, courts have held that even absent an express misrepresentation, a scheme devised with
8 the intent to defraud is still fraud if it was reasonably calculated to deceive persons of ordinary
9 prudence and comprehension. *See United States v. Thomas*, 377 F.3d 232, 241-43 (2d Cir.
10 2004), citing *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954).

11 Although one portion of the website characterizes CFO as an "Independent" committee,
12 and its FEC disclosure reporting indicates that it is an unauthorized committee, the totality of

[T]he Federal Election Commission reports receiving a number of complaints that people have fraudulently raised donations by posing as political committees or candidates and that the current law does not allow the Commission to pursue such cases....

Clearly, one can see the potential for harm to citizens who are targeted in such fraudulent schemes. Unfortunately, the Federal Election Campaign Act does not grant specific authority to the Federal Election Commission to investigate this type of activity, nor does it specifically prohibit persons from fraudulently soliciting contributions. The FEC has asked Congress to remedy this, and the amendment I offer today is in response to this request. This amendment makes it illegal to fraudulently misrepresent any candidate or political party or party employee in soliciting contributions or donations.

147 Cong. Rec. 5055 (2001) (Statement of Sen. Nelson). The limited legislative history of section 441h(b) indicates that Congress intended the prohibition on fraudulent solicitation to apply to any entity that fraudulently raises donations by posing as a political committee or candidate, or participates in a scheme intended to fraudulently raise donations by posing as a political committee or candidate. *See id.* *See also Federal Election Commission Annual Reports* for 2000 at 36 and for 1999 at 47-48 (recommending that Congress amend section 441h to prohibit fraudulent solicitation because contributions that people believed were going for the benefit of the candidate were diverted for other purposes, harming both the candidates and the contributors).

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1 circumstances suggests that CFO and Cash represented the Committee in a manner that would
2 lead a reasonable person to think that they were soliciting contributions on behalf of Sen. Obama.
3 CFO's use of the name "Obama" in its name is not by itself dispositive, but taken together with
4 other factors discussed below, the use of "Obama" in the Committee's name likely led reasonable
5 people to believe that CFO was acting on behalf of Sen. Obama:¹³

- 6 ▪ The use of the candidate's picture and the phrase "Obama '08" without a proper
7 disclaimer that CFO was not authorized by any candidate;
- 8
- 9 ▪ Complainant's reported remark, "It's called Californians for Obama. ... I thought they
10 were representatives of Obama";
- 11
- 12 ▪ The solicitation of contributions using phrases such as "the success of the campaign is in
13 your hands" and "he can't make it unless we get your support," implying that the
14 contributor is giving to Sen. Obama's campaign;
- 15
- 16 ▪ CFO's telethon is introduced as "the presidential election campaign telethon for Barack
17 Obama";
- 18
- 19 ▪ Cash's statement that he "accepted th[a] position" of State Chairman of CFO, implying
20 that he was asked to do so, presumably by Sen. Obama or his agents;
- 21
- 22 ▪ The scale and scope of CFO's advertised activities, such as needing "millions of dollars
23 to make a difference" regarding the primary election, forming 25 statewide groups to
24 formulate policies, asking for help in "walking our precincts, passing out literature," and
25 the mention of a "campaign office," suggests an official statewide candidate campaign;
- 26
- 27 ▪ The sale of "Campaign Memorabilia" including "Obama '08" items; and
- 28
- 29 ▪ The solicitation of contributions up to a maximum of \$2,300, which is the 2008 election
30 cycle limit on contributions to authorized candidate committees, see 2 U.S.C.
31 § 441a(a)(1)(A), making no mention of the aggregation of contributions to CFO and

¹³ Compare MUR 5951 with MUR 5889 (Republicans for Trauner), a recent case in which an unauthorized committee impermissibly used the name of a candidate in its name and failed to state in advertisement disclaimers whether they were authorized by any candidate, where the Commission did not find reason to believe that respondents violated section 441h(b). In that matter, Trauner was the *Democratic* candidate in the election; thus, potential contributors were unlikely to think they were contributing to Trauner's authorized committee.

1 contributions to Sen. Obama's authorized presidential committee pursuant to 11 C.F.R.
2 § 110.1(h).

3
4 Whether or not these statements and actions rise to the level of express misrepresentation,
5 the Commission believes they were reasonably calculated to deceive persons of ordinary
6 prudence and comprehension and so they appear to satisfy the fraudulent solicitation standard in
7 section 441h(b).¹⁴ See *United States v. Thomas*, 377 F.3d at 241-43.

8 In sum, as the available information suggests that CFO and Cash may have fraudulently
9 misrepresented themselves as acting on behalf of Sen. Obama for the purpose of soliciting
10 contributions, there is reason to believe that Californians for Change f/k/a Californians for
11 Obama and Kinde Durkee, in her official capacity as treasurer, violated 2 U.S.C. § 441h(b) by
12 willfully and knowingly participating in, or conspiring to participate in, a plan, scheme or design
13 to engage in fraudulent solicitation.¹⁵

¹⁴ The available information regarding fraudulent solicitation in MUR 5951 differs from some of the other section 441h(b) cases where the entities were completely fictitious and the persons responsible hid their identities. See, e.g., MUR 5384 (Never Stop Dreaming) (individuals misrepresented the entity as acting on behalf of Gephardt for President in connection with the planning of a fundraiser for the purpose of soliciting funds), MUR 5385 (Groundswell PAC) ("PAC" that was not a registered committee and not authorized by Gephardt Committee mailed a fundraising letter asking for contributions that would be used for grassroots efforts to help Gephardt win the Democratic nomination and the Presidency), and MUR 5443 (www.johnkerry-2004.com) (website fraudulently solicited contributions by passing itself off as a website authorized by John Kerry for President, Inc.).

¹⁵ The Commission has emphasized its intention to enforce the Act's prohibition on fraudulent misrepresentation. In MUR 5089 (Tuchman), a four-Commissioner Statement of Reasons ("SOR") noted that "§ 441h violations are among the most egregious transgressions of our Act." MUR 5089 SOR at 2. This SOR was "intend[ed] to put the regulated community on notice that allegations concerning § 441h violations will be taken very seriously and they will be a top Commission enforcement priority." *Id.* at 3.